

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RORY L. MICKENS,

Plaintiff,

v.

JAY INSLEE, et. al.,

Defendants.

CASE NO. 20-5259 RJB

ORDER DENYING APPEAL

THIS MATTER comes before the Court on the Plaintiff's "Objection/Appeal of Magistrate Judge J. Richard Creatura." Dkt. 75. The Court has considered the pleadings filed regarding the appeal and the remaining file.

On March 17, 2020, over 30 *pro se* prisoners filed this case, asserting various violations of their constitutional rights. Dkt. 1. On April 29, 2020, the Plaintiffs were ordered to show cause, if any they had, why the case should not be separated into individual cases. Dkt. 55. Only around 16 Plaintiffs responded to the order to show cause (along with two non-party prisoners who also signed the response). Dkt. 58. The undersigned adopted the Report and

1 Recommendation which recommended that all parties except the first named Plaintiff, Rory  
2 Mickens, be dismissed without prejudice to refile their cases, if they choose. Dkt. 65. This case  
3 was re-referred to Judge Creatura. *Id.*

4 Plaintiff then moved for assistance with his case under the Americans with Disabilities  
5 Act (“ADA”) which was construed as a motion for appointment of counsel. Dkts. 71 and 72.  
6 The motion for appointment of counsel was denied. Dkt. 72. That order additionally noted that  
7 “[t]o the extent that Plaintiff is challenging his lack of ADA accommodations, Plaintiff may raise  
8 these issues as a separate claim in his amended complaint.” *Id.*

9 The Plaintiff now appeals the denial of his motion for appointment of counsel. Dkt. 75.  
10 He points out that the prior order recognized that he “may have disabilities and could use  
11 assistance,” and so reasons that he is entitled to appointment of counsel. *Id.*

12 For the reasons stated below, Plaintiff’s appeal should be denied and the case should be  
13 re-referred to Magistrate Judge Creatura.

14 **Standard for Appeal of Order of Magistrate Judge.** Fed. R. Civ. P. 72 provides in  
15 relevant part as follows:

16 **(a) Nondispositive Matters.** When a pretrial matter not dispositive of a party's claim or  
17 defense is referred to a magistrate judge to hear and decide, the magistrate judge must  
18 promptly conduct the required proceedings and, when appropriate, issue a written order  
19 stating the decision. A party may serve and file objections to the order within 14 days  
20 after being served with a copy. A party may not assign as error a defect in the order not  
21 timely objected to. The district judge in the case must consider timely objections and  
22 modify or set aside any part of the order that is clearly erroneous or is contrary to law.

23 **Appeal of Order Denying Motion for Court Appointed Counsel.** The order denying  
24 the Plaintiff’s motion for court appointed counsel (Dkt. 72) should be affirmed.

Under 28 U.S.C. § 1915(e)(1), the court may request an attorney to represent any person  
unable to afford counsel. Under Section 1915, the court may appoint counsel in exceptional

1 circumstances. *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). To find exceptional  
 2 circumstances, the court must evaluate the likelihood of success on the merits and the ability of  
 3 the plaintiff to articulate the claims pro se in light of the complexity of the legal issues involved.  
 4 *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983).

5 Plaintiff has not shown that that the prior order was clearly erroneous or contrary to law.  
 6 Plaintiff's success on the merits is an open question. He can articulate his positions adequately  
 7 and raise issues to the court. Plaintiff's claims are not complex. The order denying the Plaintiff's  
 8 motion for court appointed counsel (Dkt. 72) should be affirmed.

9 **Re-Referral.** This case should be re-referred to U.S. Magistrate Judge Creatura.

10 **IT IS ORDERED THAT:**

- 11 • Plaintiff's Objection/Appeal of Magistrate Judge J. Richard Creatura (Dkt. 75) **IS**  
 12 **DENIED;**
- 13 • The Order denying the Plaintiff's motion for court appointed counsel (Dkt. 72) **IS**  
 14 **AFFIRMED;** and
- 15 • The case **IS RE-REFERRED** to the Magistrate Judge Creatura.

16 The Clerk is directed to send uncertified copies of this Order to U.S. Magistrate Judge J.  
 17 Richard Creatura, all counsel of record and to any party appearing *pro se* at said party's last  
 18 known address.

19 Dated this 3<sup>rd</sup> day of February, 2021.

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21 ROBERT J. BRYAN  
 22 United States District Judge  
 23  
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